2015 IL App (1st) 132503-U

SECOND DIVISION
December 8, 2015

No. 1-13-2503

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. SIR EZELL WILKINS, Defendant-Appellant,	)))))))))))	Appeal from the Circuit Court of Cook County YT45 0650 Honorable John D. Turner, Jude Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Simon and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant did not receive ineffective assistance of counsel. The trial court's failure to comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) does not rise to the level of plain error where the evidence is not closely balanced. The cause is remanded to the trial court for an initial inquiry into defendant's posttrial allegations of ineffective assistance of counsel. The $500 fine is vacated.

¶ 2 Following a jury trial, defendant Sir Ezell Wilkins was convicted of driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (West 2010)), a Class A misdemeanor, as

well as improper lane usage and driving with an expired license. On appeal, defendant contends: (1) that his counsel was ineffective; (2) the trial court failed to fulfill its duty to inquire into defendant's claim that his trial counsel was ineffective; (3) the trial court violated Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) in questioning the venire; and (4) the $500 fine imposed must be vacated. For the following reason, we vacate the $500 fine, affirm in part and remand to the trial court for proceedings consistent with this order.

¶ 3 BACKGROUND

¶ 4 On May 16, 2011, Officer Christopher Mazzone and Officer Ryan Fitzgibbons of the Chicago Heights police department were driving westbound on 14th Street in Chicago Heights, Illinois behind a red Ford Mustang. The officers observed the vehicle swerve across the white line. The vehicle's tires crossed into the other lane for approximately one to two seconds. After returning to the proper lane, the vehicle continued to swerve two more times. The third time resulted in the vehicle travelling with its tires in a different lane for approximately one block. After the third swerve, the officers activated their emergency lights. The vehicle stopped one-half block later at 14th Street and Chicago Road.

¶ 5 The officers approached the vehicle. Defendant was alone in the vehicle and he rolled down the driver’s side window when the officers approached. Officer Mazzone noticed that defendant had watery bloodshot eyes and that his breath smelled of alcohol. Officer Mazzone asked defendant if he had been drinking. Defendant admitted that he had four to five beers earlier that night. After this admission, Officer Mazzone asked the defendant to exit the vehicle and proceeded to administer three field sobriety tests in a pharmacy parking lot.

¶ 6 The first sobriety test that Officer Mazzone administered was the Horizontal Gaze

Nystagmus Test (HGN). The HGN test measures the ability to control eye movement. Officer Mazzone testified that he advised defendant to stand feet together, hands at his side. Officer Mazzone used his finger as a stimulus, twelve to fifteen inches above the defendant's eyes, and advised the defendant to follow his finger with only his eyes without moving his head. From this test, Officer Mazzone found three clues of impairment: lack of smooth pursuit, nystagmus prior to forty-five degrees, and nystagmus at maximum deviation of the eyes.

¶ 7 Next Officer Mazzone asked the defendant to participate in the "walk and turn test." Prior to administering this test, Officer Mazzone asked defendant if there was anything wrong with his legs. Officer Mazzone did not recall defendant's response but stated that he did not believe that defendant mentioned any physical impairment. Officer Mazzone directed the defendant to put his left foot in front of his right foot, keep his hands at his side and take nine heel-to-toe steps away from him while remaining on the dotted line. He further asked the defendant to turn around after the initial nine steps and take nine more steps while trying to stay on the dotted line. Officer Mazzone testified that defendant began the test before he could complete the instructions. Defendant failed to touch heel to toe, stepped off of the line, wobbled and swayed, and although he turned correctly, he was hesitant. As a result, Officer Mazzone determined that the defendant failed the "walk and turn test."

¶ 8 The last test that Officer Mazzone administered was the "one leg stand test." According to Officer Mazzone, this test is properly administered when the subject is standing on a dry, level surface free of debris with their hands and feet together. The subject then lifts up the leg of their choice about six inches while staring at their toes. The subject must then count to thirty while holding that position. Officer Mazzone provided defendant with these instructions and also

demonstrated portions of the test. Defendant indicated that he understood. While performing the test, the defendant raised his leg higher than six inches in the air, had poor balance and put his foot down multiple times. Officer Mazzone stopped the test after the defendant put his foot down the fourth time because he was concerned that the defendant would fall.

¶ 9 During the time that defendant was attempting the one leg stand test, Officer Fitzgibbons returned to the scene. He observed defendant raise his leg too high and put his foot down multiple times. Both officers determined that defendant had failed the test. In addition, as a result of the defendant's driving, his blood-shot eyes, the odor of alcohol on his breath, and the results of all three sobriety tests, the officers determined that the defendant was under the influence of alcohol. They further concluded that because of his condition, defendant could not safely operate a motor vehicle. The officers arrested defendant, placed him in the squad car and transported him to the police station.

¶ 10 At the station, defendant was taken to the room where the department's breathalyzer machine was located. Officer Fitzgibbons prepared the machine for use. Defendant ultimately refused to give a sample. Later after being read his *Miranda* rights, defendant agreed to an interview. During the interview with Officer Fitzgibbons defendant stated that for three hours prior to the stop, he was watching a basketball game and watching a movie. He stated that he drank a diet Pepsi, but he did not mention the four to five beers that he admitted to initially. He also stated that he had White Castle on the way home. Defendant did not mention having arthritis, however, he did mention an insulin shot.

¶ 11 The State admitted defendant's certified driving abstract into evidence that showed that defendant was driving without a valid license on May 16, 2011.

¶ 12 After hearing all of the evidence, the jury returned guilty verdicts on all three counts. On September 10, 2012, the defendant filed a *pro se* notice of appeal, explaining that he was not "provided with competent representation from the Public Defender's office." Defendant was sentenced on the DUI to 18-months supervision and a total of $795 in fines and fees. It is from this judgment that defendant now appeals.

¶ 13 ANALYSIS

¶ 14 Defendant first argues that the trial court failed to inquire into his *pro se* posttrial claim of ineffective assistance of trial counsel. Less than one month after his conviction, defendant filed a *pro se* document entitled "notice of appeal" in the trial court in conjunction with a handwritten document claiming that trial counsel was ineffective. In the "notice of appeal" defendant claimed that he "would like to have my conviction overturned as I was not provided with competent representation from the Public Defender's office. See attached." The attached document lists several factual claims disputing the DUI charge including that defendant: had not had a drink in 12 years, had never had a beer in his life, did not refuse to take the "chemical test," has arthritis in his knees, was unable to perform and did not perform "the test stated by the officer," and had three corneal transplants. Defendant also stated that the officer stated that defendant told him that he drank four or five beers but that information was not in the police report. This list was followed by the statement that "none of the above was presented in court as my attorney stated the prosecution had not proved their case beyond a reasonable doubt so there was no need for me to testify and also that she didn't want to make the nice policemen seem like liars."

¶ 15 Defendant's claim here amounts to an argument that the trial court erred in failing to

conduct a preliminary inquiry into his claim of ineffective assistance of counsel, as required under *People v. Krankel*, 102 Ill. 2d 181, 187-89 (1984), after he submitted his "notice of appeal" and supporting document. He asks us to remand this cause for the trial court to conduct a proper inquiry.

¶ 16 According to *Krankel* and its progeny, when a defendant makes a *pro se* posttrial allegation of ineffective assistance of counsel the trial court should conduct an adequate inquiry into the factual basis for the claim. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). If the court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. *Id*. If however, the allegations demonstrate possible neglect, then new counsel should be appointed. *Id*. The pleading requirements for raising a *pro se* claim of ineffectiveness of counsel are somewhat relaxed, but a defendant must satisfy minimum requirements to trigger a *Krankel* inquiry by the trial court. *People v. Bobo*, 375 Ill. App. 3d 966, 985 (2007). A defendant must provide some factual specificity for the allegation of ineffective assistance of counsel. *People v. Cunningham*, 376 Ill. App. 3d 298, 304 (2007). We review defendant's claim *de novo*. *People v. Taylor*, 237 Ill. 2d 68, 75 (2010).

¶ 17 Defendant clearly made a *pro se* posttrial claim of ineffective assistance of counsel. Although it was labeled as a "notice of appeal," his claim was filed prior to sentencing. The State argues that defendant has failed to meet the minimum pleading requirements to trigger an inquiry by the trial court. Specifically, the State argues that defendant's statement in the supporting document was "seemingly related to his trial" but not sufficient to trigger an inquiry. We disagree.

¶ 18 A "*pro se* defendant is not required to do any more than bring his or her claim to the trial court's attention." *Moore*, 207 Ill. 2d at 79. We are not convinced, based on the record before us, that defendant's written statement to the trial court was as inadequate as labeled by the State. In the document attached to the "notice of appeal" defendant stated that he had "not drank in twelve years," had "never drunk beer in [his] life" and "did not refuse to take the breathalyzer chemical test." He also stated that he had "three corneal transplants" and "arthritis in [his] knees." He also stated that "the officer stated that I told him that I had drank (*sic*) four to five beers but it was not in the police report." Defendant further stated that "none of the above was presented in court as my attorney stated the prosecution had not proved their case beyond a reasonable doubt so there was no need for me to testify and also that she didn't want to make the nice policemen seem like liars."

¶ 19 While defendant did not use the words "ineffective assistance," or present his claim in a formal written motion, defendant clearly informed the trial court that he believed trial counsel failed to investigate impeaching information which defendant claimed was known to defense counsel but not presented in court. Furthermore, defendant seems to be implying that defense counsel interfered with his right to testify on his own behalf. While a criminal defendant's trial lawyer has the right to make ultimate decisions about matters of tactics and strategy, the decision about whether to testify "ultimately belongs to the defendant," not his lawyer. *People v. Medina*, 221 Ill.2d 394, 403 (2006). As such, we find defendant has met the minimum pleading requirements so as to trigger the need for an initial inquiry.

¶ 20 Here, the trial court did not conduct any inquiry into defendant's ineffective assistance claim. "The law requires the trial court to conduct some type of inquiry into the underlying

factual basis, if any, of a defendant's *pro se* posttrial claim of ineffective assistance of counsel." *Moore*, 207 Ill. 2d at 79. During an initial inquiry:

> "[S]ome interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim. Trial counsel may simply answer questions and explain the facts and circumstances surrounding the defendant's allegations. [*Citations*.] A brief discussion between the trial court and the defendant may be sufficient. [*Citations*.] Also, the trial court can base its evaluation of the defendant's *pro se* allegations of ineffective assistance on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face." *Moore*, 207 Ill. 2d at 78-79.

¶ 21 Our "operative concern" as a court of review is to ensure that the trial court has made an adequate inquiry. *Id*. Because the trial court made no inquiry whatsoever in this case, we must remand this cause to the trial court for that limited purpose. *Id.* at 79.

¶ 22 Defendant also makes a freestanding claim of ineffective assistance of counsel. Specifically, defendant argues that counsel failed to tender an instruction to resolve the jury's confusion concerning his refusal to take a Breathalyzer test, failed to object to testimony by the police concerning the HGN sobriety test and failed to present evidence promised to the jury in opening statements.

¶ 23 To establish a claim for ineffective assistance of counsel, defendant must show: (1) that counsel's representation fell below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Morgan*, 187 Ill. 2d 500, 529-30 (1999). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Morgan*, 187 Ill. 2d at 530. If defendant cannot demonstrate that he suffered prejudice, then a court need not address whether counsel's performance was deficient. *Id.* Generally, matters of trial strategy will not support a claim of ineffective assistance of counsel unless counsel failed to conduct any meaningful adversarial testing. *People v. Patterson*, 217 Ill. 2d 407, 441 (2005).

¶ 24 During deliberations, the jury asked three questions of the trial court. Relevant to this case, the jury asked "[i]s it admission of guilty if one refuses to take the breathalyzer test?" After some discussion, defense counsel, the State and the trial court agreed that the court should answer by telling the jury "you have heard all of the evidence in the case, you have the law, please continue to deliberate." Defendant now claims that defense counsel was ineffective for failing to propose an alternative answer to the jury's question. The State responds and argues that any other answer would have resulted in the trial court improperly commenting on the evidence.

¶ 25 There is no question that defendant's refusal to submit to a Breathalyzer was properly admitted. Evidence of a person's refusal to take a test designed to determine the person's blood-alcohol content is admissible and may be used to argue the defendant's consciousness of guilt. *People v. Johnson*, 218 Ill. 2d 125, 140 (2005); 625 ILCS 5/11-502 (West 2010).

¶ 26 "The general rule is that the trial court has a duty to provide instruction to the jury where it has posed an explicit question or requested clarification on a point of law arising from facts about which there is doubt or confusion." *People v. Childs*, 159 Ill. 2d 217, 228-29 (1994). The

trial court, however, has the discretion to "decline to answer a jury's inquiries where the instructions are readily understandable and sufficiently explain the relevant law, where further instructions would serve no useful purpose or would potentially mislead the jury, when the jury's inquiry involves a question of fact, or if the giving of an answer would cause the court to express an opinion which would likely direct a verdict one way or another." *Id*. at 228. How the trial court responds to a question posed by the jury during deliberations is "ordinarily left to the discretion of the trial court, so that the trial court's decision will be disturbed on appeal only if that decision constituted an abuse of discretion." *People v. Falls*, 387 Ill. App. 3d 533, 537 (2008).

¶ 27 Here, the trial court properly refused to answer the jury's question, and defendant's counsel did not render ineffective assistance of counsel for failing to object, where the jury's question called for the court to make a conclusion of law. A trial court "has a duty to avoid giving the jury its opinion on evidence and should not answer a question that requires conclusion on issues at trial." *People v. Almendarez*, 266 Ill. App. 3d 639, 647-48 (2008). A statement of the trial judge's view on the legal effect of the evidence presented in this case would have been improper. Any response other than the one given by the trial court would have required the court to step out of its role as a neutral arbitrator. See *People v. Hudson*, 157 Ill. 2d 401, 446 (1993) (where the court held that when the jury is adequately instructed on the defendant's theory of the case, further jury instruction would serve no purpose because the jury is the sole judge on believability of witnesses). Therefore, we find that where the trial court did not abuse its discretion in answering the jury question, defendant did not suffer prejudice as a result of counsel's failure to propose an alternate answer.

¶ 28 Next, defendant argues that trial counsel was ineffective for failing to object to Officer Mazzone's testimony about the HGN test. Defendant contends that Officer Mazzone was not qualified as an expert, and did not administer the test in accordance with the National Highway Transportation Safety Administration standards. At the start of trial, defense counsel made an uncontested oral motion to preclude the officers from testifying that the HGN test indicates intoxication. During the course of trial Officer Mazzone testified about his qualifications and the procedure he used to administer the HGN test. The defendant maintains that because counsel did not object to this testimony, she was ineffective.

¶ 29 HGN results are admissible, as is any other evidence of a defendant's behavior, to prove that the defendant is under the influence of alcohol, provided a proper foundation has been laid. *People v. Buening*, 229 Ill. App. 3d 538, 546 (1992). A proper foundation should consist of describing the officer's education and experience in administering the test and showing that the procedure was properly administered. *Id*.

¶ 30 Defendant claims that defense counsel should have objected to Officer Mazzone's testimony based on the lack of foundation. During the State's direct-examination of Officer Mazzone, the state asked, "[d]id you receive training on how to administer field sobriety tests?" Officer Mazzone replied that he received training while at the Police Training Institute at the University of Illinois. He further stated that the training was "a few days for approximately six weeks." Also, Officer Mazzone testified that at the end of this training he had to take practical exams as well as written exams, which he passed. The State further asked Officer Mazzone what the HGN test was, how it was and should be administered, and what happened when he administered the test to the defendant. Clearly, the State laid a proper foundation for Officer

Mazzone's testimony about the HGN test.

¶ 31 We also reject defendant's argument that counsel was ineffective for failing to object to Officer Mazzone's testimony because Officer Mazzone improperly administered the HGN test. Defendant claims that Officer Mazzone did not follow the manual by failing to check the defendant's eyes before the test, did not testify about the maximum length of time that defendant's eyes were held at maximum deviation, conflated and confused the protocol for testing at maximum deviation, did not testify that he tested each eye individually and repeated the procedure.

¶ 32 Defendant has failed to establish how counsel's failure to object to Officer Mazzone's testimony regarding the administration of the HGN test prejudiced him. Even without the testimony of the HGN test, the evidence was sufficient to prove defendant guilty of DUI beyond a reasonable doubt. Officer Mazzone observed defendant drive his vehicle over the dotted white line on three occasions. After he was pulled over, Officer Mazzone observed that defendant had red, bloodshot eyes and his breath smelled of alcohol. Defendant's speech seemed mumbled. After being questioned, defendant admitted that he had four to five beers while watching a basketball game. Defendant participated in the "walk and turn test," which he failed because he was wobbling and swaying, did not touch heel to toe and stepped off of the line. Defendant also failed the "one leg stand test" because he had poor balance and put his foot down multiple times. Given the evidence against him, which defendant does not dispute here, we cannot say that defendant suffered prejudice as a result of counsel's failure to object to the State’s questioning of Officer Mazzone regarding the HGN test.

¶ 33 Finally, defendant faults counsel for failing to present evidence promised to the jury in

opening statements. During her opening statement defense counsel told the jury that the defendant would testify and explain that his driving and failure to pass the three sobriety tests were a result of his age, being tired and various health conditions. Defense counsel stated that the defendant would testify that he was not under the influence of alcohol. At the close of the State's case in chief, upon learning that the defendant would not testify, the trial court asked him "[i]s it your decision alone not to testify, sir?" to which the defendant replied "[y]es." Ultimately, the defendant did not testify and during closing argument counsel explained to the jury:

> "Ladies and Gentlemen, I told you this morning that Mr. Wilkins would testify, but he didn't. The reason for that is that after hearing the testimony, I as his counsel and my co counsel advised him not to because we also heard the testimony that you heard, and we advised him that it was not necessary for him to testify.
>
> Now, why would we tell him that? Because you heard from two officers, they were very pleasant officers. I am sure they are very hard working officers, but they were also very inexperienced officers at the time of Mr. Wilkins's arrest. They didn't have three years experience between the two of them.
>
> Now, the State's Attorney asked them whether or not they had seen people under the influence during their professional life and they said yes; yes, they had, but their professional experience was a year and a half, not enough experience to prove Mr. Wilkins guilty beyond a reasonable doubt.
>
> There is another reason. The officers said that Mr. Wilkins never informed them that he had any physical impairments. Mr. Wilkins is fifty-nine years old. He didn't have an opportunity to testify to tell you that, based on my advice."

¶ 34 We decline to address this issue here because it is sufficiently related to one of the issues of ineffective assistance of counsel defendant raised in this posttrial motion so that it would fall within the scope of the court's inquiry into defendant's ineffective assistance claims on remand.

¶ 35 Defendant next argues that the trial court violated Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) in questioning the venire where it failed to inform the venire about the principle that the defendant is not required to testify and failed to ask the venire if it understood any of the four principles.

¶ 36 Rule 431(b) requires:

> " The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.' Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

¶ 37 The State correctly asserts that defendant has forfeited review of this error because he failed to object during *voir dire* and has failed to include this issue in his posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988); see also *People v. Thompson*, 238 Ill. 2d 598 (2010). Consequently, we review this issue for plain error.

¶ 38 The plain error doctrine allows a court of review to consider a forfeited error when "(1)

the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005).

> "In the first instance, the defendant must prove 'prejudicial error.' That is, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. The State, of course, can respond by arguing that the evidence was not closely balanced, but rather strongly weighted against the defendant. In the second instance, the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Id.* at 187.

However, before considering plain error, we must first consider whether error occurred at all. *People v. Harris*, 225 Ill. 2d 1, 31 (2007).

¶ 39 In this case, the trial court addressed the venire and stated:

> "Under the law, the Defendant is presumed innocent of the charges against him. The presumption remains with the Defendant at every stage of the trial, during the jury's deliberation on the verdict. It is not overcome unless and until the jury is convinced from all of the evidence in this case, beyond a reasonable doubt that the Defendant is guilty.
>
> The State has the burden of proving the guilt of the Defendant beyond a reasonable doubt. The State carries this burden with them throughout the case. The Defendant is not required to prove his innocence. The Defendant need not present any evidence at all. The Defendant rely – may rely upon the presumption of innocence."

Later, the court again admonished the venire:

> "[T]he Defendant is presumed innocent until the jury during deliberations

determines from all of the evidence that the Defendant is guilty beyond a reasonable doubt. Does anyone have a question—a problem with that?

The State has the burden of proving the Defendant guilty beyond a reasonable doubt. Does anyone disagree with requiring the State to meet that burden?

The Defendant does not have to present any evidence at all in this case. The Defendant may rely upon the presumption of innocence. Does anyone have any any difficulty with extending the Defendant that presumption throughout the trial? All right."

¶ 40 Defendant claims that these admonitions contain two separate errors. First, the court entirely omitted the principle that defendant was not required to testify. Second, the court failed to ask the venire whether they understood the other three principles.

¶ 41 Rule 431(b) "mandates a specific question and response process." *Thompson*, 238 Ill. 2d at 607. "The rule requires questioning on whether the potential jurors both understand and accept each of the enumerated principles." *Id*. Accordingly, failure to ascertain whether the jurors both understand and accept the principles constitutes a violation of Rule 431(b) and therefore, error. *Id*; See also *People v. Wilmington*, 2013 IL 112938, ¶ 28. Here, there is no question based on the record before us that error occurred. The trial court did not inform the venire that defendant was not required to testify and failed to ask the venire whether they understood the other three principles.

¶ 42 Defendant argues that plain error occurred because the evidence in this case was closely balanced. Defendant however, makes no argument in his opening brief as to how the evidence in this case can be construed as closely balanced. He does refer us back to his argument regarding

counsel's ineffectiveness for agreeing to the jury's question about the significance of a refusal to take the breathalyzer test and seems to suggest that the evidence can be considered closely balanced solely based on the fact that "the hung jury note indicates that at least one member of the jury may well have believed counsel's theory of defense even without Wilkins's testimony, and convicted only because of confusion about the significance of Wilkins's refusal to submit to the breathalyzer test."

¶ 43 Although the jury posed questions to the trial court during the deliberative process, "there is no indication in the record that the jury at any time had reached an impasse or that the jurors themselves considered this a close case." *Wilmington*, 2013 IL 112938, ¶ 35. Similar to *Wilmington*, we do not view the jury's note in this case to be an indication that it was a "hung jury" or that the note showed that "at least one member of the jury may have believed counsel's theory of defense even without Wilkins's testimony, and convicted only because of confusion about the significance of Wilkins's refusal to submit to the breathalyzer test" or that the jury considered this a close case. This is pure speculation by the defendant because there is nothing in the record that supports this conclusion or informs us of the reason for the jury's inquiry. In the context of a Rule 431(b) error and a plain error/closely balanced evidence analysis, our independent review of the evidence in this case does not lead us to conclude that the evidence was closely balanced. Defendant was observed swerving between lanes, smelled of alcohol, and had slurred speech. He admitted to having four or five beers before driving. He failed three of the three field sobriety tests administered and refused to submit to a breathalyzer. As such, the trial court's failure to comply with Rule 431(b) cannot be considered plain error because the evidence is not closely balanced.

¶ 44 Finally, defendant argues and the State agrees that the $500 fine imposed pursuant to section 5/11-501(c)(4) of the Illinois Vehicle Code must be vacated because the statute only applies to defendants who have a blood alcohol content of 0.16 or above and there was no evidence in this case of defendant's exact blood alcohol content. 625 ILCS 5/11-501(c)(4) (West 2010). Accordingly, we vacate the $500 fine imposed.

¶ 45 CONCLUSION

¶ 46 For the foregoing reasons, we vacate the $500 fine, affirm in part and remand this cause to the trial court for proceedings consistent with this order.

¶ 47 Affirmed in part; cause remanded; $500 fine vacated.